



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2004

Ms. Mitzi Chafetz
Public Information Officer
Texas Funeral Service Commission
P.O. Box 12217
Austin, Texas 78711

OR2004-3873

Dear Ms. Chafetz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201814.

The Texas Funeral Service Commission (the "commission") received a request for seventeen categories of information, including "all documents and employee files" of two former commission employees. You claim that some of the information encompassed by this aspect of the request is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.² We assume that you have released all other information held by or available to the commission that is responsive to the request, to the extent that such information existed when the commission received this request. If not, then you must release all such information at this time.³ We note that the Public Information Act (the "Act"), chapter 552 of the Government Code, does not require the

¹Although you have attempted to withdraw your claim under section 552.101, we note that this section is a mandatory exception to disclosure that a governmental body may not waive. See Gov't Code §§ 552.007, .352; Open Records Decision Nos. 674 at 3 n.4 (2001), 325 at 1 (1982).

²We note that the commission also notified the former employees to whom the submitted information pertains of this request for information. We have received no correspondence from either of these individuals. See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

³See Gov't Code §§ 552.006, .221, .301, .302; Open Records Decision No. 664 (2000).

commission to release information that did not exist when it received this request or to create responsive information.⁴

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, the release of the submitted Form I-9 would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the commission must withhold the Form I-9 that we have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). The commission must withhold the W-4 form that we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code.

A social security number is excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the commission to obtain or maintain a social security number. Thus, we have no basis for concluding that these social security numbers were obtained or are maintained under such a law and are therefore confidential under the federal law. We caution you, however, that the Act imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the commission should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

⁴*See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Section 552.101 also encompasses the common-law right to privacy. Information must be withheld from public disclosure under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private).

Common-law privacy also encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Thus, a public employee's allocation of part of the employee's salary to a voluntary investment program offered by the employer is a personal investment decision, and information about that decision is protected by common-law privacy. *See, e.g.*, Open Records Decision Nos. 600 at 9-12 (1992) (participation in TexFlex), 545 at 3-5 (1990) (deferred compensation plan). Likewise, the details of an employee's enrollment in a group insurance program, the designation of the beneficiary of an employee's retirement benefits, and an employee's authorization of direct deposit of the employee's salary are protected by common-law privacy. *See* Open Records Decision No. 600 at 9-12. But where a transaction is funded in part by a governmental body, it involves the employee in a transaction with the governmental body, and the basic facts about that transaction are not private under section 552.101. *See id.* at 9 (basic facts of group insurance provided by governmental body not protected by common-law privacy).

Section 552.102 excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). This exception is applicable to information that relates to public

officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy test under section 552.102(a) is the same as the test of common-law privacy under section 552.101. *See* *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

You contend that the submitted documents contain private personal financial information, as well as information relating to an individual's job performance that is of no legitimate public interest. We have marked personal financial information that the commission must withhold under section 552.101 in conjunction with common-law privacy. The other information that you claim is private relates to a former employee of the commission and the manner in which he performed his official responsibilities. As this office has often noted, the public has a legitimate interest in information that relates to public employees and their employment-related conduct. Therefore, such information is not private. Accordingly, the commission may not withhold the information that relates to the former employee's job performance under sections 552.101 or 552.102 in conjunction with common-law privacy. *See* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 4 (1986) (public employee's personnel file information will generally be available to public, regardless of whether it is highly intimate or embarrassing), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common-law privacy), 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate public concern).

Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. The determination of whether a particular item of information is excepted from disclosure under section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the commission's receipt of this request for information. The commission may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the current or former employee's section 552.117 information confidential.

You inform us that the former employees to whom the submitted information pertains did not affirmatively choose under section 552.024 to disclose their section 552.117 information. You also inform us that one of the former employees requested in writing that his home

address, home telephone number, and social security number not be released to the public. We note, however, that the commission received the former employee's request for confidentiality after the commission received the present request for information. Thus, you have not demonstrated that either of the former employees made a timely request under section 552.024 to keep any of the submitted information confidential. In the event, however, that either of the former employees made a written request for confidentiality under section 552.024 before the commission received this request for information, we have marked the information that the commission would be required to withhold under section 552.117(a)(1). In this regard, we note that the post office box number that you have highlighted is not the former employee's "home address" for purposes of section 552.117. Therefore, under no circumstances would this post office box number be excepted from disclosure under section 552.117(a)(1). *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

Section 552.130 excepts from public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that you must withhold under section 552.130.

Section 552.136 makes account numbers and certain other "access devices" confidential. This section provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked a credit card account number that you must withhold under section 552.136.

Section 552.137 makes some e-mail addresses confidential. This section provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137.⁵ Section 552.137 excepts from disclosure a personal e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address affirmatively consents to

⁵Section 552.137 is a mandatory exception to disclosure that a governmental body may not waive. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

its public disclosure. Section 552.137 is not applicable to the types of e-mail addresses listed in section 552.137(c) or to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that you must withhold under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the commission must withhold the I-9 form under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (2) the commission must withhold the W-4 form under section 552.101 in conjunction with section 6103 of title 26 of the United States Code; (3) the commission may be required to withhold the former employees' social security numbers under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (4) the commission must withhold the personal financial information that is protected by common-law privacy under section 552.101; (5) the information that we have marked under section 552.117(a)(1) is excepted from disclosure if the former employee to whom the information pertains made a timely written request for confidentiality under section 552.024; (6) the commission must withhold the Texas driver's license information under section 552.130; (7) the commission must withhold the credit card number under section 552.136; and (8) the commission must withhold the e-mail addresses under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure. The rest of the submitted information is not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

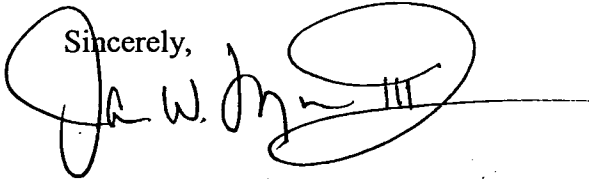
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't. of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris III", with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 201814

Enc: Submitted documents

c: The Honorable Miguel "Mike" D. Wise
Texas House of Representatives
P.O. Box 2910
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(w/o enclosures)